

1 Edward McCutchan (SBN 119376)
2 **SUNDERLAND | McCUTCHAN, LLP**
3 412 Aviation Boulevard, Suite D
4 Santa Rosa, California 95403
5 Telephone: (707) 284-5524
6 Facsimile: (707) 284-5527

7 Attorneys for Plaintiff and Judgment Creditor
8 DONALD THORN

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10 **UNITED STATES BANKRUPTCY COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12
13 **SANTA ROSA DIVISION**

14 In re:

15 Case No.: 13-10923-AJ-7

16 Javier Agusto and Heidi Erica Alvarez

17 A.P. No.: 13-01103

18 Debtors./

19 Donald Thorn

20 Plaintiff,

21 v.

22 Javier Agusto and Heidi Erica Alvarez

23 Defendants./

24 **PLAINTIFF DONALD THORN'S REPLY
TO DEFENDANTS' OPPOSITION TO
THE UNDISPUTED MATERIAL FACTS
IN SUPPORT OF HIS SUMMARY
JUDGMENT MOTION**

25 Date: April 4, 2014

26 Time: 9:00 a.m.

27 Place: 99 South E Street
Santa Rosa, California

28 A.P. Filed: August 6, 2013

Trial Date: September 17, 2014

Judge: Alan Jaroslovsky

29 Plaintiff Donald Thorn submits the following reply to defendants' opposition to his
30 separate statement of undisputed material facts and supporting evidence in support of his
31 summary judgment motion, pursuant to California Code of Civil Procedure § 437c, subd. (b).

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1 Issue 1 – THE AMENDED JUDGMENT ENTERED BY THE SUPERIOR COURT IS NOT
2 DISCHARGEABLE IN BANKRUPTCY

3 Defendants' Response, Objections, and 4 Evidence Supporting Contention that this Fact is Disputed:	5 Moving Party's Reply and Supporting Evidence:
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1888 1889<br	

<p>1 intent to cause injury to Plaintiff as required 2 under 11 U.S.C. § 523(c). Furthermore, the 3 Court's judgment was delivered NOT after a 4 full litigated trial but by way of a judgment on 5 the pleadings resulting because of Defendants' 6 mistake in responding to Plaintiff's Requests 7 for Admissions. Therefore, the Court received 8 and heard no evidence in regards to Defendants conduct and therefore made no actual finding regarding the issue of willful and malicious intent as it applies to nondischargeability in bankruptcy court.</p> <p>9 Furthermore, the asserted fact lacks foundation 10 and is hearsay. (California Evidence Code 11 Section 1200 et seq.) Additionally, Defendants have not received Plaintiffs' responses to discovery on this issue.</p> <p>12</p> <p>13 <u>Evidence:</u> Defendants ask that the Court take 14 judicial notice of all papers, pleadings and 15 argument in the underlying Civil Court case hereinafter Sonoma County Superior Court 16 case number SCV-246852, and specifically page 3, paragraph 2 of the Amended Judgment, filed 10/10/2012. Also, see the declarations of 17 Defendants.</p>	<p>Superior Court case number SCV-246852.</p>
<p>18 4. <u>Disputed.</u> The fact asserted by Plaintiff is 19 disputed because Defendants' answers to Plaintiff's complaint reveals that the State 20 Court made no finding regarding willful and malicious intent nor did the State Court 21 consider evidence regarding the issue of willful and malicious intent. The finding that a intentional tort was committed is not sufficient 22 for a finding of nondischargeability under 11 U.S.C. § 523(c). Furthermore, the imposition 23 of the attorney's fees as relied upon by Plaintiff in <u>In re Lopez</u> (2007) 367 B.R. 99 does not in and of itself constitute a finding of willful and 24 malicious intent under 11 U.S.C. § 523(c). <u>In</u> <u>re Lopez</u> is distinguishable from the present matter for the reasons outlined in Defendants' Opposition to Plaintiff's Motion for Summary 25 26 27 28</p>	<p>4. This is inaccurate: See June 8, 2012 judgment, October 10, 2012 amended judgment, notice of motion for attorney's fees under Civil Code § 3426.4 and memorandum of points and authorities in support of an award of attorney's fees under Civil Code § 3426.4 by plaintiff Donald Thorn in Sonoma County Superior Court case number SCV-246852.</p>

<p>1 Judgment.</p> <p>2</p> <p>3 <u>Evidence:</u> Defendants ask that the Court take</p> <p>4 judicial notice of all papers, pleadings and</p> <p>5 argument in the underlying Civil Court case</p> <p>6 hereinafter Sonoma County case number SCV-</p> <p>7 246852, and specifically page 3, paragraph 2 of</p> <p>8 the Amended Judgment, filed 10/10/2012.</p> <p>9 Also, see the declarations of Defendants.</p>	
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8 Additional Undisputed Material Facts:

9 Defendants Contend the Following Material	10 Moving Party's Response and Supporting
<p>11 Facts are Undisputed:</p> <p>12 1. It is undisputed that the State Trial Court in</p> <p>13 the underlying civil action relied upon by</p> <p>14 Plaintiff did not receive any evidence regarding</p> <p>15 the issue of willful and malicious intent to</p> <p>16 cause injury to Plaintiff.</p>	<p>17 1. <u>Disputed.</u></p> <p>18</p> <p>19 <u>Evidence:</u> See June 8, 2012 judgment, October</p> <p>20 10, 2012 amended judgment, notice of motion</p> <p>21 for attorney's fees under Civil Code § 3426.4</p> <p>22 and memorandum of points and authorities in</p> <p>23 support of an award of attorney's fees under</p> <p>24 Civil Code § 3426.4 by plaintiff Donald Thorn</p> <p>25 in Sonoma County Superior Court case number</p> <p>26 SCV-246852.</p>
<p>27 2. It is undisputed that the State Trial Court</p> <p>28 judgment in the underlying civil action did not</p> <p>resolve after a full trial on the merits but rather</p> <p>by way of a judgment on the pleadings due to</p> <p>Defendants' mistake in responding to Requests</p> <p>for Admissions.</p>	<p>2. <u>Disputed.</u></p> <p>3. <u>Evidence:</u> See June 8, 2012 judgment, October</p> <p>10, 2012 amended judgment, notice of motion</p> <p>for attorney's fees under Civil Code § 3426.4</p> <p>and memorandum of points and authorities in</p> <p>support of an award of attorney's fees under</p> <p>Civil Code § 3426.4 by plaintiff Donald Thorn</p> <p>in Sonoma County Superior Court case number</p> <p>SCV-246852.</p>
<p>4. It is undisputed that the State Trial Court</p> <p>judgment in the underlying civil action held</p> <p>only that Defendants "...intentionally and</p> <p>purposefully took plaintiff Donald Thorn's</p> <p>client list..."</p>	<p>3. <u>Disputed.</u></p> <p>4. <u>Evidence:</u> See June 8, 2012 judgment, October</p> <p>10, 2012 amended judgment, notice of motion</p> <p>for attorney's fees under Civil Code § 3426.4</p> <p>and memorandum of points and authorities in</p> <p>support of an award of attorney's fees under</p> <p>Civil Code § 3426.4 by plaintiff Donald Thorn</p> <p>in Sonoma County Superior Court case number</p> <p>SCV-246852.</p>

PLAINTIFF DONALD THORN'S REPLY TO DEFENDANTS' OPPOSITION TO THE UNDISPUTED MATERIAL FACTS IN

1 4. It is undisputed that Defendant Javier
2 Alvarez worked for Plaintiff as a process
3 server and continued working for Plaintiff for
free during the month of November 2009.

4. Disputed.

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Evidence: Objection. This request is barred by judicial estoppel per the June 8, 2012 judgment and the October 10, 2012 amended judgment awarding attorney's fees in favor of plaintiff and against Javier Agusto Alvarez and Heidi Erica Alvarez under California Civil Code § 3426.4 in Sonoma County Superior Court case number SCV-246852. (See In re Lopez (2007) 367 B.R. 99) The issue in this adversary proceeding is whether or not these two judgments have judicial estoppel effect per plaintiff's motion for summary judgment set for hearing on March 7, 2014.

11 5. It is undisputed that Defendant Javier
12 Alvarez and Plaintiff engaged in negotiations
13 regarding the sell /sic/ of Plaintiff's business to
14 Defendants and that Defendant made an initial
payment to Plaintiff of \$500.00 for purchase of
the business.

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5. Disputed.

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1 PROOF OF SERVICE
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3 STATE OF CALIFORNIA, COUNTY OF SONOMA
4

5 I am employed in the County of Sonoma, State of California. I am over the age of 18 and
6 not a party to the within action; my present address is: 412 Aviation Boulevard, Suite D, Santa
7 Rosa, California 95403.

8 On March 24, 2014, I served the foregoing document described as **PLAINTIFF**
9 **DONALD THORN'S REPLY TO DEFENDANTS' OPPOSITION TO THE STATEMENT**
10 **OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF HIS MOTION FOR SUMMARY**
11 **JUDGMENT** on the parties by placing a true copy thereof enclosed in a sealed envelope addressed
12 as follows:

13 **SEE ATTACHED SERVICE LIST**
14

15 XX By Regular U.S. Mail. The documents were placed for collection and mailing following
16 ordinary business practice for deposit in the United States Postal Service in a sealed envelope with
17 postage thereon fully prepaid, addressed as stated above.

18 _____ By personal service. I caused each such envelope to be delivered by hand to the
19 addressee(s) as stated above.

20 _____ By facsimile transmitted from (707) 284-5527. The document transmission was reported as
21 complete and without error.

22 _____ By email or electronic transmission. I caused the document to be sent to the persons at the
23 email addresses listed below. I did not receive within a reasonable time after the transmission any
24 electronic message or other indication that the transmission was unsuccessful.

25 I declare under penalty of perjury under the laws of the State of California that the foregoing
26 is true and correct and that this declaration was executed on March 24, 2014, at Santa Rosa,
27 California.
28


Kathleen M. Dahl

In re: Javier Agusto Alvarez, Heidi Erica Alvarez
United States Bankruptcy Court Case No.: 13-10923-AJ-7

Attorneys for Defendants/Debtors: Javier Agusto Alvarez and Heidi Erica Alvarez

Carl E. Combs, Esq.

Byron T. Nelson, Esq.

Law Offices of Carl E. Combs

515 13th Street

Modesto, CA 95351

Tel: (209) 522-5400

Fax: (209) 522-0407

Email: combslawyer@gmail.com